SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 481

NOBLE DRILLING CORPORATION,
Petitioner,

versus

CLYDE J. SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Noble Drilling Corporation, prays that a writ of certiorari issue herein to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated June 2, 1969, (Appendix "B") affirming the judgment of the district court, and the denial of the application for rehearing dated July 7, 1969 (Appendix "C").

OPINIONS BELOW

The opinion of the United States District Court, Eastern District of Louisiana, is reported at 272 F.Supp. 321; it is reprinted in full as Appendix "A" hereof.

The opinion of the United States Court of Appeals for the Fifth Circuit, No. 25798, is unreported as of this date; it is reprinted in full as Appendix "B" hereof.

JURISDICTION

On June 2, 1969, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court, Eastern District of Louisiana, which judgment was adverse to petitioner. The Court of Appeals for the Fifth Circuit denied petitioner's application for rehearing on July 7, 1969.

The judgment and opinion of the District Courts and opinion of the Court of Appeals involved important questions concerning the interpretation and application of general maritime law principles and are in conflict with applicable decisions of this Court and should be settled by this Court.

Therefore, the jurisdiction of two Courts is sought pursuant to the provisions of 28 U.S.C.A. 1254 (1); June 25, 1948, C.646, 62 Stat. 928.

QUESTIONS PRESENTED

The questions presented are:

I. Does an oil field worker have a claim under the Jones Act, 46 U.S.C.A., when injured on a stationary platform in the Gulf of Mexico while performing duties of a non-maritime nature when his employer is not the ship owner but a drilling contractor even though at times the employee may perform services on a vessel?

II. As a matter of law, whether or not the employee's exclusive remedy as against his employer is under the Longshoremen's and Harbor Workers' Compensation Act?

III. May an employee of a drilling contractor recover maintenance and cure from his employer even though his employer was not the owner of any vessel at the time of injury and the employee was not in the service of any vessel at time of injury?

CONSTITUTIONAL PROVISIONS AND STATUTES

The statutes involved in this matter are:

1. The Jones Act, 28 U.S.C.A. 688
2. The Submerged Lands Act, 43 U.S.C.A. 1333
3. The Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. 901

STATEMENT OF THE CASE

This suit was brought by Clyde J. Smith against petitioner, Noble Drilling Corporation, under the Jones Act, 46 U.S.C.A. 688 and the General Maritime Law for damages and maintenance and cure. He recovered

judgment for damages after a jury trial and further was awarded maintenance and cure by the Court.

On July 15, 1963, Smith sustained injuries while working on a fixed stationary drilling platform located in the Gulf of Mexico on The Outer Continental Shelf. At the time of his injury, he was in the course and scope of his employment with petitioner, Noble Drilling Corporation.

Noble Drilling Corporation, a drilling contractor, was hired by the California Oil Company to drill oil wells from the stationary platform. Noble provided, under its contract with the California Oil Company, a drilling rig, and a completion rig and the personnel to operate those rigs.

The platform was owned by the California Oil Company.

In support of the drilling operation taking place on the structure, the California Oil Company furnished a vessel, owned by it commonly known as a drilling tender. This tender was anchored alongside the platform and performed several special functions in aid and support of the drilling operation taking place on the structure. It mainly served as a warehouse and living quarters for the persons working at the site.

The tender was manned by a master and licensed crew, hired by the California Oil Company, who served the navigational functions of the ship and saw to its maintenance. Also, it was manned by roustabouts em-

ployed by the California Oil Company who did maintenance work such as chipping and painting, keeping the vessel clean, and loading supplies from supply boats. These roustabouts transferred all equipment between the tender and drilling structure. The tender was further manned by stewards hired by the California Oil Company from a catering company who prepared meals and took care of the living area aboard the tender. Except for a small mud pump located on the tender, all of Noble's equipment making up the drilling rig and completion rig was located on the structure.

Noble had a total of four crews on location to operate their rigs, two crews on the drilling rig and two crews on the completion rig, each crew working a twelve hour tour.

The small mud pump located on the tender was used in connection with the drilling rig to pump mud up to the tanks on the platform when needed, and was the main mud pump for the completion rig when circulating mud and other liquids needed to complete a well.

Smith was hired as a floorman with one of the completion crews. His primary duties were performed on the platform although, because of his experience, the driller in charge of his crew chose him to operate the pump on the tender when it was needed.

At the time of his injury, Smith was on the platform, assisting certain other Noble personnel in lifting a dis-

charge line and a piece of equipment fell on his foot. Prior to the accident, the plaintiff had been operating the mud pump.

The case was submitted to a jury on the question of status under the Jones Act, 46 U.S.C.A. 688, and the jury answered special interrogatories, finding that on the date of the accident, Smith was a seaman and member of the crew of the tender, Noble was negligent, Smith was contributorily negligent to the extent of ten percent (10%) and his total damages was Thirty Thousand Dollars ($30,000.00).

By stipulation, the question of whether Smith was entitled to maintenance and cure was submitted to the Court for determination, and the Court determined that he was.

Noble's motions for a directed verdict were denied during trial and thereafter judgment was entered in favor of Smith in accordance with the jury's findings and for maintenance and cure.

Noble's motion for judgment notwithstanding the verdict and for a new trial were denied and Noble appealed to the Court of Appeals for the Fifth Circuit for relief. The judgment was affirmed and an application for rehearing was denied.

THE FEDERAL QUESTIONS

The injury involved in this litigation occurred in the Gulf of Mexico on the outer continental shelf of the United States.

The applicability and nonapplicability of Federal Statutes are involved, along with General Maritime Law concerning allowance of maintenance and cure.

ARGUMENT

The work being performed by Smith at the time of his accident was non-maritime. The structure on which he was injured had no connection with admiralty. *Rodrigue vs. Aetna Casualty and Surety, et al,* No. 436, decided by this Court in October term, 1968. (___ U.S. ___, 23 L.Ed.2d. 340, ___ S.Ct. ___).

Smith, at the time of his injury, was not in the service of the drilling tender nor was he performing work of a seaman. He was in the course of his employment with his employer Noble Drilling Corporation as a floorhand or roughneck, which was his main duty. Noble did not own, manage, or control the operation of the tender.

A jury question was not present in this case. Smith's exclusive remedy as against his employer was under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq. Said act was extended to the outer continental shelf in the Submerged Lands Act, 43 U.S.C.A. 1333. The Longshoremen's and Harbor Workers' Compensation Act restricts the operation of the Jones Act to a seaman who is either a master or member of a crew of a vessel, injured in the course of his employment as such. *Swanson vs. Marra Bros., Inc.*, 328 U.S. 1, 90 L.Ed. 1045, 66 S.Ct. 869; *O'Donnell vs. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 87

L.Ed. 596, 63 S.Ct. 488; *Senko vs. La Crosse Dredging Corp.*, 352 U.S. 370, 1 L.Ed. 2d 404, 77 S.Ct. 415

The Courts below have erred in not giving proper effect to this Court's decision in *Braen vs. Pfeifer Oil Transp. Co.*, 361 U.S. 129, 4 L.Ed. 2d 191, 80 S.Ct. 247. In its opinion the Court of Appeals passed over in short order the fact that Smith was injured on the fixed drilling platform instead of on the tender stating that it was "immaterial." It cited its own decisions and Braen as authority. Braen dealt with an employee of a shipowner who had the status of mate. This Court said: "The issue is whether petitioner, a mate and therefore a 'seaman' was injured in the course of his employment.' We conclude that he was." The Court at the same time said, "At times the work done by an employee will be crucial in determining what his status is for purposes of recovery." Numerous cases were thereafter cited.

The Court of Appeals has erred in holding that there is no practical difference between the terms "seaman" and "member of the crew" except in those cases where the maritime employee had only such transitory connections with the vessel that it could be said almost as a matter of law that he was not a crew member. This is contrary to the holdings of this Court. *South Chicago Coal & Dock Co. vs. Bassett*, 309 U.S. 251, 84 L.Ed. 732, 60 S.Ct. 544; *Norton vs. Warner Co.*, 321 U.S. 565, 88 L.Ed. 931, 64 S.Ct. 747; *Swanson vs. Marra Bros.*, 328 U.S. 1, 90 L.Ed. 1045, 66 S.Ct. 869.

To reiterate, Noble, Smith's employer, did not own

the tender and Smith's injury did not arise out of activity related to the tender. Smith was not injured through the negligence of a crew member or master of any vessel. Negligence of a shipowner or his agents is the gravamen of the Jones Act. *De Zon vs. American President Lines,* 318 U.S. 660, 87 L.Ed. 1065, 63 S.Ct. 814; Norris "The Law of Seaman" 2d Ed., page 844. Such negligence did not exist here.

Petitioner does not concede that Smith was a seaman when operating the mud pump on the tender but takes the position that as a matter of law even if he was a seaman, he was not a member of the crew at that time. And even if he was a member of the crew at that time, he was not in the course of his employment as a seaman or member of the crew at the time of his injury.

An erroneous statement of fact was made by the Court of Appeals in its opinion which petitioner feels should be pointed out. The Court said that the injured worker was a mud pumper who spent most of his working time aboard the tender. This is not correct and the record so reflects. (Record pages 74, 86, 106, 155 and 156). He was a floorhand (roughneck) who performed most of his work on the drilling platform.

The Courts below allowed Smith maintenance and cure. The Court of Appeals cited cases in support of its decision which deal with injuries incurred during leave-time activities. Justice Harlan in his dissent in the case of *Braen vs. Pfeifer Oil Transp. Oil,* supra, posed this exact issue stating in footnote 2: "Whether,

on the facts in the case before us, the petitioner would be found to have been working 'in the service of his ship' for purposes of the doctrine of maintenance and cure, we need not decide, for the Court advances no reason for assimilating the issue of Jones Act coverage to that of the availability of maintenance and cure."

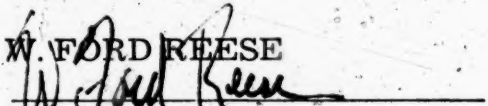
A seaman cannot recover maintenance and cure unless his injury occurred in the service of his vessel. *Farrell vs. United States,* 336 U.S. 511; 93 L.Ed. 850; 69 S.Ct. 707.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted to the end that this Honorable Court will review the decision below.

The questions presented in the petition involve great importance to the oil industry in the Gulf of Mexico.

Respectfully submitted,



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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Petition for Certiorari have been served upon petitioner, Clyde J. Smith, Jr., by depositing the same, postage prepaid, in the United States mail, addressed to his attorney, ~~Samuel C. Gainsburgh~~ HAROLD LANDY CARONDELET, Esq. ~~1718 National Bank of Commerce~~ Building, New Orleans, Louisiana 70112, at New Orleans, Louisiana, this 16th day of August, 1969.

W. Ford Reese

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APPENDIX "A"

CLYDE J. SMITH,
Plaintiff,
v. Civ. A. No. 14610.

NOBLE DRILLING CO., Inc.,
Defendant.

United States District Court
E. D. Louisiana,
New Orleans Division
Aug. 31, 1967.

RUBIN, District Judge:

During the trial of this case the parties stipulated that, in the event the jury returned a verdict for the plaintiff, the Court would decide all issues concerning defendant's right to credit for the amount previously paid as benefits under the Longshoremen and Harbor Workers' Act.[1] and the amount by which the jury award is to be increased to reflect the amount due the plaintiff as maintenance and cure. It was further stipulated that defendant has paid $3,812.66 in medical and $3,010.00 in compensation at the rate of $70.00 per week.

[1] Since it has been determined that the plaintiff was a seaman and therefore was not covered by the Longshoremen and Harbor Workers' Act,[2] he was not

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[1]33 U.S.C.A. §901
[2]Ibid.

due any payments under that Act. Instead, he was due maintenance and cure, as a seaman, in addition to the sums awarded by the jury.

[2-4] As a general rule, a person cannot recover money voluntarily paid with full knowledge of the facts, whether he seeks to do so by direct action, set-off, or counterclaim.[3] For that principle to apply, however, the overpayments must have been truly voluntary, that is, "done by design or intentionally or purposely or by choice or of one's own accord or by the free exercise of the will."[4] Money paid under a mistake of fact can be recovered even though the payer was negligent or was carelessly ignorant of the facts.[5] Even salary or commission erroneously overpaid to an employee by mistake can be recovered.[6]

Where payments had been made to an employee under the Louisiana Workmen's Compensation Act, and the employee later recovered under the Jones Act, Judge E. Gordon West of this district held that the employer was entitled to a credit for the workmen's compensation payments previously made to the plaintiff.[7]

[5,6] For these reasons, the defendant should be permitted to offset against the amount awarded the

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[3]70 C.J.S. Payment § 133, page 341. Pure Oil Co. v. Tucker, 8 Cir., 1947, 164 F.2d 945; Heidt v. United States, 5 Cir., 1932, 56 F.2d 559, cert. denied 53 S.Ct. 8, 287 U.S. 601, 77 L.Ed. 523.

[4]Gulf Oil Corporation v. Lone Star Producing Co., 5 Cir., 1963, 322 F.2d 28, discussing Texas law in a diversity case.

[5]Ibid. See also A.L.I. Restitution § 18, page 84.

[6]Annotation: Payments to Employee — Recovery Back, 88 A.L.R.2d 1437, 1452.

[7]Williams v. Offshore Company, 1963, 216 F.Supp. 98.

plaintiff the amount previously paid to the plaintiff as compensation. The parties have in effect agreed that the amount of the medical expense would have been added to the jury verdict and recovered in addition to it; therefore this amount should not be offset against the present verdict which includes nothing for medical expense.

[7] There is no merit to the claim that the plaintiff is not entitled to be paid maintenance at all, because he is a seaman only for purposes of the Jones Act. Defendant's counsel seeks to distinguish injuries sustained in the service of the ship for the purpose of maintenance and cure from those sustained in the scope of employment for the purpose of the Jones Act. This issue was dealt with directly in Weiss v. Central Railroad Co. of New Jersey,[8] where the court said:

> "Generally the criteria for determining whether or not plaintiff is a 'seaman' for purposes of maintenance and cure are the same as those governing his right to recover under the Jones Act, 46 U.S.C. § 688."[9]

[8] Maintenance is due the plaintiff in addition to lost wages where he has not claimed "found," that is, the value of board and lodging, as part of his claim for damages.[10] Any other result would not only permit the plaintiff a double recovery but would have the undesirable result of impelling employers to resist the

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[8] 2 Cir., 1956, 235 F.2d 309.
[9] Id. at 311.

payment of compensation in any case where there is the slightest doubt of status, on the basis of a possible risk of double exposure.

Therefore, it is ordered that the Clerk enter judgment for the plaintiff in the amount of the verdict less $1,204.00 which represents the difference between the compensation paid by defendant and the amount due the plaintiff for maintenance at the rate of $6.00 per day, from July 15, 1963 to May 4, 1964.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25798

NOBLE DRILLING CORPORATION,
Appellant,

versus

CLYDE J. SMITH,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 2, 1969)

Before WISDOM, THORNBERRY and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: Science having sent the drilling for oil and gas out to sea, problems have arisen regarding the liability to amphibious workmen injured while performing duties relating to offshore drilling operations. The injured worker here was a mud pumper who was injured on an offshore drilling platform but who spent most of his working time aboard a tender

servicing the platform. The question is whether this worker was a "seaman" or a "member of the crew" of a vessel within the contemplation of the Jones Act.[1] We hold that Clyde J. Smith, the injured pumper, was a Jones Act seaman and we affirm.

I.

Smith brought this suit against Noble Drilling Corporation his employer, under the Jones Act and the General Maritime Law to recover damages and maintenance and cure for the injuries he received while working for Noble Drilling on a stationary drilling platform located in the Gulf of Mexico on July 15, 1968. The facts are not in dispute. Noble Drilling, pursuant to a contract with the California Oil Company, had undertaken to drill the well in question. Except for a small but essential mud pump located on a tender

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[1]The Jones Act, 18 U.S.C.A. § 688 (1964), provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

known as the S-25, which was owned and operated by California Oil, all of Noble Drilling's equipment was located on the platform on which Smith was injured.

Smith was hired to work on the drilling platform with one of the completion crews. However, because of his experience, Smith was assigned to operate the mud pump which was permanently affixed to the deck of the tender. He ate and slept aboard the S-25 which admittedly was a self-propelled "vessel." His duties required him to operate and repair the pump, to mix mud, and to check the viscosity of the mud, all of which had to be performed aboard the tender. Smith, therefore, of necessity spent a substantial percentage of his working time on the tender. On the day of his injury Smith had worked aboard the tender from midnight until almost noon, and he had come up to the platform only a few minutes before his injury.

Upon these facts the jury found that Smith was a seaman and a member of the crew of the tender. It also found that Noble Drilling was negligent and that the damages sustained by Smith amounted to $30,000. The court then determined that Smith was entitled to maintenance and cure. Judgment was entered accordingly.

II.

On appeal the basic contention of Noble Drilling is that Smith was an oil field worker whose remedy is under the Longshoremen's and Harbor Workers' Com-

pensation Act,[2] as extended by the Outer Continental Shelf Lands Act,[3] rather than under the Jones Act. Noble Drilling contends that Smith does not have a right to damages under the Jones Act because he was

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[2]The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §903 (1957), provides:

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of —

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

[3]The relevant part of the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1333(c) (1964), provides:

(c) With respect to disability or death of an employee resulting from any injury occurring as the result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section —

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

not a "member of the crew" of any vessel even though technically he may have had the status of a seaman.

This argument ignores the origin and purpose of the term "member of the crew." This term does not appear in the provisions of the Jones Act, which speaks only of "[a]ny seaman who shall suffer personal injury in the course of his employment." Originally the word "seaman" was interpreted so broadly that it encompassed "stevedores employed in maritime work on navigable water" as their work "was a maritime service formerly rendered by the ship's crew." *International Stevedoring Co. v. Haverty*, 1926, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157, 159. Subsequently and partly as a result of the *Haverty* decision, Congress passed the Longshoremen's and Harbor Workers' Compensation Act which covers all maritime workers except "master[s] or member[s] of the crew of any vessel." *Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769, 774, 75 A.L.R.2d 1296. The Supreme Court then held that the purpose and effect of this enactment was to limit the benefits of the Jones Act to employees who are either masters or members of the crew of a vessel and whose injuries occur during the course of their employment. *Swanson v. Marra Bros., Inc.*, 1946, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045.

From this brief history of the term "member of the crew" it should be apparent that the term is used primarily to distinguish maritime workers whose presence aboard ship is transitory from those with a more permanent attachment to the vessel. Stevedores and offshore roughnecks who do no more than sleep and

eat aboard a tender fall into the former category. *Freeman v. Aetna Casualty & Surety Co.*, 5 Cir. 1968, 398 F.2d 808; *Ross v. Delta Drilling Co.*, E.D. La. 1962, 213 F.Supp. 270. The determination of which employees fall into the latter category presents a question of fact which is often difficult and which must be resolved on a case by case basis. *Senko v. Lacrosse Dredging Corp.*, 1957, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404; *Gianfala v. Texas Company*, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775, reversing *Texas Company v. Gianfala*, 5 Cir. 1955, 222 F.2d 382; *Bodden v. Coordinated Caribbean Transport*, 5 Cir. 1966, 369 F.2d 273.

Although in the historical sense the term "seaman" is broader than "member of the crew," the two terms have come to be used interchangeably as synonyms. "In the context used in this and similar cases involving the maritime amphibious worker on drilling craft offshore in the Gulf of Mexico, the difference between the two terms 'seaman' and 'member of the crew of any vessel' is so slight as to be virtually indiscernible and, for all practical purposes, may be disregarded." *Boatel, Inc. v. Delamore*, 5 Cir. 1967, 379 F.2d 850, 859. Accordingly, we have approved interrogatories which used the term "member of the crew" instead of "seaman." *Id.; Offshore Company v. Robison, supra.* Likewise it is proper for a district court to use "member of the crew" in instructing the jury as to what connection with a vessel a maritime worker must have in order to be a Jones Act seaman. Since the terms "seaman" and "member of the crew" have drowned in their own semantics, what is now decisive is the analysis of what constitutes a Jones Act seaman

in the judge's instructions to the jury — how he resuscitates the deoxygenated terms by explaining the significance of the employee's water domicile, his commitment to the ship, and the locus of his labor.

Today, therefore, there is no practical difference between the terms "seaman" and "member of the crew," except in those cases where the maritime employee had only such transitory connections with the vessel that it could be said almost as a matter of law that he was not a crew member. *cf. Texas Company v. Savoie*, 5 Cir. 1957, 240 F.2d 674, *cert. denied*, 355 U.S. 840, 78 S.Ct. 49, 2 L.Ed.2d 51. Thus if there is an evidentiary basis for this status question to go to the jury, the distinction has lost all relevance. See, *Hardway Contracting Co. v. O'Keefe*, 5 Cir. 1968, ____ F.2d ____ [Nos. 25276, 25492, Nov. 14, 1968].

For the standard to be used in determining whether there was a jury question with respect to Smith's maritime status, we refer to the words of Judge Wisdom in *Offshore v. Robison, supra*, 266 F.2d at 779-780:

> "[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed

to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

* * *

"Attempts to fix unvarying meanings have a firm legal significance to such terms as 'seaman,' 'vessel,' 'member of a crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts. The Jones Act cases involving coverage are similar in this respect to many negligence and contributory negligence cases."

"Under the Jones Act, judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the claimant was a seaman, a member of a crew of a vessel."

Applying this standard to the case *sub judice*, we find that "with reason, the conclusion may be drawn that [Smith] was a seaman member of the crew of a vessel." First, Smith was assigned to operate the mud pump which was permanently emplaced on the tender S-25, which undisputedly was a vessel, and he spent a substantial amount of his working time on the vessel. Second, his duties with respect to the mud pump directly contributed to the fulfillment of one of the primary functions of the tender S-25 — the pumping of mud and other fluids to the drilling platform for use there. There was, therefore, sufficient evidence to send the status question to the jury and to support the jury's finding that Smith was a Jones Act seaman. See, *Producers Drilling Co. v. Gray*, 5 Cir. 1966, 361 F.2d 432; *Stanley v. Guy Scroggins Construction Co.*, 5 Cir. 1961, 297 F.2d 374; *cf. Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 5 Cir. 1960, 280 F.2d 523.

In navigating the legal shoals to the decision in this case, we are guided by *Boatel, Inc. v. Delamore, supra*, a decision which has only immaterial factual distinguishments from the case at bar. In *Boatel*, the injured seaman worked in the engine room of a tender which was moored for considerable periods of time to a stationary drilling platform in the Gulf of Mexico and, like Smith, he slept and ate aboard the vessel. There are, however, two factual differences between *Boatel* and the case under consideration: (1) the injured employee there held United States Merchant Marine Seamen's papers issued by the Coast Guard, and (2) he was injured on board the tender whereas Smith was injured on the drilling platform. In this

factual context this Court per Judge Ainsworth held that the injured seaman was covered by the Jones Act:

> "The Deputy Commissioner's conclusion that the JOSEPH ZEPPA was primarily being employed to assist in drilling operations and that all of claimant's duties were solely in connection with the drilling operations is of no moment under the circumstances here. Delamore was primarily engaged in performing duties aboard the vessel in fulfilling the function for which the vessel was designed. By his work in the engine room as a diesel motorman, he contributed to the mission of the vessel which was to cooperate in the drilling operations. In this regard, therefore, he was primarily aiding in navigation of the vessel whose purpose was the drilling of an oil well." 379 F.2d at 858-859.

In view of the Fifth Circuit policy of liberally construing the Jones Act, the factual distinctions between *Boatel* and the case *sub judice* should not compel a contrary result. The absence of seamen's papers does not matter as Smith did have substantial duties aboard the S-25. See, *Offshore v. Robison, supra.*[4] Since a man does not become a seaman by papers alone, he should not be denied his statutory status as a seaman

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[4]"Robison had never worked as a seaman on board a vessel, as the terms 'seaman' and 'vessel' are ordinarily understood. *He had never carried seaman's papers*, and none of the oil crew carried seaman's papers as a condition of employment." [Emphasis added.] 266 F.2d at 771.

merely because he is not a paper seaman. We also find it immaterial that Smith was injured on the fixed drilling platform instead of on the tender. *Crafton v. Tennessee Valley Sand & Gravel Co.*, 5 Cir. 1969, ___ F.2d ___ [No. 26,833 March 11, 1969], teaches us:

> "Since recovery under the Jones Act is predicated on the injury taking place 'in the course of employment,' the exact place of injury is not controlling. *Magnolia Towing Company v. Pace*, 5 Cir., 1967, 378 F.2d 12. The only requirement is that the seaman be 'doing the work of his employer pursuant to his employer's orders.' *Braen v. Pfeifer Oil Transportation Company*, 1959, 361 U.S. 129, 133, 80 S.Ct. 247, 4 L.Ed.2d 191. . . ."

See also *Creel v. Drill Tender Jack Cleverly*, W.D. La. 1966, 264 F. Supp. 98, 100, wherein a "mud man" who was a member of the crew of a tender was allowed recovery even though he was injured while working on the drilling platform; and *Senko v. Lacrosse Dredging Corp., supra*, 352 U.S. at 373, 1 L.Ed.2d at 408, wherein the Supreme Court held: "[t]he fact that petitioner's injury occurred on land is not material."

In concluding its agrument on this issue, Noble Drilling makes the time-worn contention that allowing recovery here would constitute an extension of the statutory word "seaman" far beyond the bounds intended by Congress. We like the court in *Offshore v. Robison*, find this position to be untenable:

"There is no reason for lamentations. Expansion of the terms 'seaman' and 'vessel' are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act. There is nothing in the act to indicate that Congress intended the law to apply only to conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico. Many of the Jones Act seamen on these vessels share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling." 266 F.2d at 780.

III.

The final unsupportable position advanced by Noble Drilling is that Smith is not entitled to maintenance and cure because he was not "in the service of the ship" at the time of his injury. If a seaman is "in the service of the ship" while on shore leave in a

foreign port, see, *Central Gulf Steamship Corp. v. Sambula*, 5 Cir. 1968, 405 F.2d 291, 299, it would be unreasonable to say that a seaman working out from our shores in the Gulf of Mexico on a drilling platform, which his vessel has the function of servicing, is not also in the service of his ship. See, *Warren v. United States*, 1951, 340 U.S. 523, 71 S.Ct. 432, 95 L.Ed. 503 (seaman injured by fall out of window of dance hall while on authorized shore leave held to be "in the service of the ship" and entitled to maintenance and cure). We therefore hold that Smith was entitled to maintenance and cure. To hold otherwise would relieve the shipowner of his long recognized obligation to care for seamen injured in connection with "hazards encountered only by reason of the voyage," *Aguilar v. Standard Oil Co.*, 1942, 318 U.S. 724, 733, 63 S.Ct. 930, 87 L.Ed. 1107, 1115 and would be contrary to the proposition that doubts as to liability for maintenance and cure are to be resolved in favor of the wounded seaman. *Id.*, 318 U.S. at 735, 87 L.Ed. at 116; *Warren v. United States, supra*, 340 U.S. at 530, 95 L.Ed. at 510.

We affirm the judgment of the district court that Smith is entitled to damages under the Jones Act and to maintenance and cure.

AFFIRMED.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25798

NOBLE DRILLING CORPORATION,
Appellant,

versus

CLYDE J. SMITH,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 7, 1969)

ON PETITION FOR REHEARING

Before WISDOM, THORNBERRY and GOLDBERG, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.